



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 1, 1996

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
DeWitt C. Greer State Highway Bldg.
125 E. 11th Street
Austin, Texas 78701-2483

OR96-1365

Dear Ms. Soldano:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40753.

The Texas Department of Transportation (the "department") received a request for information concerning Freecon, Inc. ("Freecon"). You assert that the information at issue is confidential under section 552.110 of the Government Code. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.; *see also* Open Records Decision No. 522 (1989).

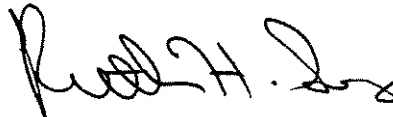
As provided by section 552.305 of the Open Records Act, this office provided Freecon the opportunity to submit reasons as to why the information at issue should be withheld. However, Freecon did not submit reasons as to why the information at issue should be withheld from disclosure. This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Nor has the department or Freecon shown that the submitted information comes within the commercial or financial aspect of section 552.110. The department argues that release of the information at issue could reveal Freecon's profit margin and harm its business. We note that "mere conclusory assertion of a possibility of commercial harm" is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." In this situation, section 552.110 has not been shown to be applicable to the information at issue.

However, the federal tax return information included in the documents submitted to this office, including the income tax return schedules, are confidential under federal law. 26 U.S.C. § 6103(a). The information at issue, other than the federal income tax information, therefore must be released.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 40753

Enclosures: Submitted documents

¹You assert that releasing the information at issue would be contrary to section 552.101, which provides that information made confidential by law may not be disclosed, because release would be "compromising, frustrating, and causing harm to TxDOT in carrying out relevant statutes promulgated by the Legislature in order to facilitate contracts between this department and 'disadvantaged businesses.'" The provisions to which you refer, however, do not make the information confidential by law.

cc: Mr. Tom Schick, P.E.
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(w/o enclosures)

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